

Estate of Gamba

2025 NY Slip Op 30653(U)

January 8, 2025

Surrogate's Court, Bronx County

Docket Number: File No. 131P1987

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

January 8, 2025

ESTATE OF JAMES GAMBA, Deceased
File No.: 131P1987 and 131P1987A

In this contested proceeding, the decedent's grandson, James Fulgione ("James") filed a petition seeking to be appointed successor trustee of a testamentary trust pursuant to Paragraph THIRD of the decedent's will dated October 28, 1980 ("the instrument") that was admitted to probate pursuant to a decree of this court dated March 13, 1987. Another grandson, Joseph Fulgione ("Joseph"), served and filed objections to James' application with a counterclaim in lieu of a cross petition seeking his own appointment. James thereupon filed a reply and a motion seeking to dismiss Joseph's objections and counterclaim on various grounds including, inter alia, Joseph's failure to respond to disclosure demands. Objections to James' application indicating a preference that Joseph serve as successor trustee were also asserted by the trust's lifetime income beneficiary, the decedent's daughter, Frances Fulgione ("Frances"). As relevant herein, the instrument conveys the decedent's residence located at 2887 Lamport Place

("the Bronx realty") and any rental income from its tenants, to a testamentary trust for Frances' benefit during her lifetime. Upon her death, the realty was to be sold and the proceeds were to be distributed per stirpes to Frances' children: James, Joseph and Emilio/Emile ("Emilio") Fulgione, who died on September 22, 2015, without a spouse or issue. No fiduciary has been appointed for his estate. The original trustee, Frank Gamba ("Frank") died on March 2, 1998. As Frances is now deceased, it is necessary to appoint a successor trustee to sell the realty and distribute the remaining trust assets to Frances' children, as directed in the instrument.

Background

The decedent died on December 12, 1980 at the age of 80. His distributees were three children: Frances, Frank Gamba ("Frank") and Elizabeth Carpini, who were equal residuary beneficiaries under the instrument. Realty located at "Bruckner Boulevard" in the Bronx was devised to Frank.

The instrument also nominated Frank, Louis Camia ("Louis") and Herbert K. Lippman ("Herbert") as executors of the instrument and trustees for Frances' lifetime trust. Although Louis and Herbert were appointed co-executors with Frank, they renounced the trustee appointment and Frank served as sole trustee. Notwithstanding that the trust had no fiduciary after Frank's death, Frances paid the expenses for the Bronx realty and collected the rents from tenants until September, 2016, when she entered the Esplanade, a senior living facility located in Palisades, New York.

After her admission, James assisted Frances with her day to day and financial affairs. There are issues of fact concerning subsequent collection and utilization of the rents.

Efforts at mediation were unavailing. Numerous settlement conferences were subsequently held with the parties, their attorneys and a member of the court's Law Department, at which counsel for the Public Administrator also participated and indicated a willingness to serve as successor trustee, obtain a fair market appraisal for the realty from a court approved appraiser and retain an appropriate real estate broker to market it for sale. A proposed written stipulation negotiated by counsel consenting to the PA's appointment remains unexecuted by the grandsons, who request that their pending applications be submitted for determination. The sole trust asset, the Bronx realty, is presently vacant, in a deteriorated condition and uninsured. The grandsons also reject any interim proposals to reinstate the insurance coverage and secure the realty.

The Grandsons' Contentions

Both James and Joseph assert that the other refuses to comply with their respective good faith discovery requests and that there remain outstanding requests for production for, inter alia, bank statements, rental receipts and invoices for the maintenance of the Bronx realty and financial and medical records pertaining to Frances.

James' Petition

In support of the request to be appointed successor trustee, James asserts that from June 17, 1988 until December of 2015, Frances paid all of the bills and collected the income derived from the Bronx realty, and became incapable due to dementia in or about 2015. Because of declining physical and mental health, Francis went to live at the Esplanade where she could have supportive services. A successor trustee is necessary to manage and upkeep the realty. James is thoroughly familiar with the affairs of the lifetime trust and the deceased lifetime beneficiary's needs and previously assisted Frances in collecting the rents and paying the bills for the realty.

James continues that he was never found to be dishonest, guilty of substance abuse and is not a felon. On the other hand, Joseph previously declared bankruptcy and his spouse, Jodi Weisz Fulgione ("Jodi"), allegedly embezzled funds from her former employer. Accordingly, James avers that he is the only trust beneficiary qualified to serve as successor trustee.

Joseph's Objections

Joseph alleges that James totally controlled the Bronx realty and Frances' affairs even prior to her entry into the Esplanade without consulting with her. James "took over" her bank accounts and converted several "In Trust For" bank accounts totaling \$50,000 that were designated to equally benefit the grandsons' children. As a result, James improperly received \$30,000. He manipulated and isolated Frances from family

members and friends, and refused to permit in person visitation and telephone access at the Esplanade. He also haphazardly managed the Bronx realty and incurred substantial bank overdrafts and rejected any input by Joseph.

Significantly, Joseph admits that there is no substantive communication with James, whose threatening text messages and emails to him persist, all of which demonstrate a history of bitterness and anger mitigating against James' appointment as successor trustee. Accordingly, Joseph asserts a counter claim requesting that he be appointed sole successor trustee, and, should the court decline his application, asks that the court appoint a third-party neutral successor trustee.

Reply to Objections

James replies that Joseph and Jodi collected the rents from the tenants after Frances went to the Esplanade and deposited same into their own accounts and not Frances' joint account with Joseph at TD Bank. They paid the bills for the Bronx realty late, many remaining in arrears, and failed to apply the net funds for Frances' benefit. As a result, there was a monthly shortfall between \$2,000 to \$3,000 for Frances' expenses at the Esplanade, which James paid from his personal funds. Frances' TD joint bank account with Joseph was constantly overdrawn, with overdraft fees exceeding \$1,925 for 55 insufficient funds incidents, additional penalties and interest. Joseph also made his own personal charges on Frances' TD Bank debit card. Joseph and Jodi also changed the locks at the Bronx realty in order to deny

access by James.

James continues that Joseph's request to be appointed successor trustee is improperly asserted as a counterclaim. In any event, Joseph is unqualified to serve as trustee, not only because of his personal financial irresponsibility but for mismanagement and conversion of funds belonging to Frances. For example, after Emilio's death Frances received approximately \$39,970.70 as beneficiary of a life insurance policy. After the proceeds were deposited in the aforesaid joint TD bank account, Joseph withdrew \$35,000 and refuses to account for those funds and other collections.

James' Motion to Strike the Objections and Joseph's Cross Motion to Compel Disclosure

James' motion seeking to strike Joseph's objections and the "cross petition"/counterclaim contained therein principally relies on Joseph's refusal to comply with document production. In opposition, Joseph's attorney affirms that Joseph served the requisite documents and, in fact, it was James who refused to comply with Joseph's document demands. Counsel for the parties entered into a written stipulation that was "so-ordered" directing document production.

Joseph then filed a cross motion seeking to vacate the "so-ordered" stipulation, compel further discovery and impose sanctions on the ground that James did not produce any of the stipulated discovery and

refuses to respond to Joseph's document demands claiming that they are "untimely," as served several days after the stipulated due date. In support of the cross motion, Joseph's attorney affirms that there is no prejudice from his efforts to compel production that were served several days after the stipulated date since James possess documents directly relevant to Joseph's claims and there is no claim of privilege. For example, James purported to control Frances' affairs pursuant to a power of attorney, which he refuses to produce, and there are recordings of Frances denying that she executed a power of attorney and admitting to only signing a health care proxy.

Thereupon the grandsons' attorneys entered into a further stipulation, inter alia, deeming the requests for production, opposition thereto and the petition and "cross petition"/cross claim seeking to be appointed successor trustee to be timely served and submitted.

Determination

The palpable hostility between James and Joseph permeates the proceedings. Although they are represented by counsel, James and Joseph improperly make ad hominem comments concerning each other, interrupt their attorneys, interfere with good faith efforts to make any headway in moving the matter forward and deflect inquiries concerning possible cash on hand from rent collections that might be utilized to insure the realty. Although they vehemently oppose the other's serving as successor trustee, they cannot agree on any neutral person, including relatives, family friends, or an unaffiliated attorney who could serve as

successor fiduciary. They are fixated on their rancor towards each other that they disregard the impending loss or diminution in value of the Bronx realty, the alleged sole trust asset.

The court finds that the disharmony and hostility rise to the level such that it jeopardizes the interest of all trust beneficiaries and the proper administration of the trust (see Matter of Beharris, 84 AD3d 1227, 1229 [2nd Dept 2011]; Matter of Pepe, NYLJ, Feb. 27, 2020, at 28, col 5 [Sur Ct, Bronx County 2020]; Matter of King, NYLJ, Jan. 11, 2013 at 23, col 2 [Sur Ct, Bronx County 2013]; Matter of Rad, 162 Misc. 2d 229 [Sur Ct, New York County 1994]). Accordingly, on this state of the record, and the alternative request contained in the counterclaim asserted in Joseph's objections that, should his request to be appointed successor trustee be denied, he alternatively consents to the appointment of a "neutral," and in order to salvage the realty, the court finds that neither James nor Joseph is qualified to serve as the successor fiduciary of the trust because of demonstrated hostility that rises to the level of endangering the administration of the trust. The court further determines that it is in the best interests of the trust and ultimately to its beneficiaries, to appoint a neutral successor fiduciary with authority to not only take appropriate steps to marshal and sell the realty but also to administer the trust.

That branch of Joseph's counterclaim alternatively requesting that a neutral fiduciary serve as successor fiduciary is granted to the extent that the court appoints the Public Administrator ("PA") to serve as successor

trustee upon duly qualifying therefor. Although the PA has the authority to market and sell the Bronx realty in whatever manner she deems advisable (see SCPA 1123 [1]; EPTL 11-11.1 [b] [5] [B]), she may thereafter, at her discretion, serve and file an appropriate application seeking the appointment of an independent appraiser and broker for the realty.

This decision constitutes the order of the court dismissing James' petition and Joseph's objections with counterclaim/"cross petition" seeking to be appointed successor executor and granting that branch of said counterclaim requesting the appointment of a neutral fiduciary only to the extent heretofore determined. James and Joseph are directed to turn over all records pertaining to the trust and Bronx realty and any assets in their possession or control including, inter alia, all rents, security deposits and other receipts to the successor trustee within thirty days of the date of the decree to be entered hereon and immediately turn over the keys and grant access to the premises as directed by the successor trustee to effectuate its marshaling, marketing and sale.

Settle decree and proceed accordingly.


HON. NELIDA MALAVÉ-GONZÁLEZ
SURROGATE